

2008

Taylor West Weber Water Improvement District v.
Jerry D. Olds, Weber Basin Water Conservancy
District, United States of America Bureau of
Reclamation : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Taylor West Weber Water Improvement District v. Jerry D. Olds, Weber Basin Water Conservancy District, United States of America Bureau of Reclamation*, No. 20080504 (Utah Court of Appeals, 2008).
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IN THE UTAH SUPREME COURT

TAYLOR-WEST WEBER WATER
IMPROVEMENT DISTRICT,

Plaintiff and Appellee,

v.

JERRY D. OLDS, State Engineer of the State
of Utah; WEBER BASIN WATER
CONSERVANCY DISTRICT, a political
subdivision of the State of Utah; and UNITED
STATES OF AMERICA BUREAU OF
RECLAMATION,

Defendants and Appellees,

ROY CITY,

Intervenor and Appellant.

Civil No. 20080504-SC

REPLACEMENT BRIEF OF APPELLEE
UTAH STATE ENGINEER

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY
HONORABLE PAMELA G. HEFFERNAN
Civil No. 070904167AA

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FILED
UTAH APPELLATE COURTS

APR 15 2009

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
ISSUE PRESENTED	2
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
BACKGROUND-- <i>DE NOVO</i> REVIEW OF STATE ENGINEER DECISIONS ...	6
ARGUMENT	12
1. ROY CITY DOES NOT SATISFY UAPA's DEFINITION OF "PARTY" FOR BOTH STATE AGENCY ACTIONS AND JUDICIAL REVIEW OF THOSE ACTIONS.	12
2. INTERVENTION BY NON-PARTICIPANTS IN THE COURT'S <i>DE NOVO</i> REVIEW OF STATE ENGINEER ORDERS WOULD EVISCERATE THE STATE ENGINEER PROCESS AND DISRUPT THE EXPECTATIONS OF WATER USERS' AND OTHERS IMPACTED BY THEIR USE.	15
3. ALLOWING UNLIMITED ACCESS TO THE <i>DE NOVO</i> REVIEW PROCESS BY PERMITTING "INFORMANTS" – SUCH AS ROY CITY – TO INTERVENE WILL EVISCERATE THE STATE ENGINEER'S ROLE AS WATER ADMINISTRATOR AND WILL UNDERMINE THE <i>DE NOVO</i> REVIEW.	20
CONCLUSION	23
STATEMENT REGARDING ORAL ARGUMENT	23

TABLE OF AUTHORITIES

Cases:

<i>Archer v. Bd. of State Lands and Forestry</i> , 907 P.2d 1142 (Utah 1995)	9
<i>Badger v. Brooklyn Canal Co.</i> , 922 P.2d 745 (Utah 1996)	9, 18
<i>Bonham v. Morgan</i> , 788 P.2d 497 (Utah 1989)	7
<i>Chatterton v. Walker</i> , 938 P.2d 255 (Utah 1997)	22
<i>Crafts v. Hansen</i> , 667 P.2d 1068 (Utah 1983)	9, 10
<i>Eardley v. Terry</i> , 77 P.2d 362 (Utah 1938)	9, 10
<i>In re Bear River Drainage Area</i> , 271 P.2d 846 (Utah 1954)	6
<i>Krouse v. Bower</i> , 2001 UT 28	2
<i>Kunz & Co. v. State</i> , 913 P.2d 765 (Utah 1996)	8, 16
<i>Maverik Country Stores v. Indus. Comm’n</i> , 860 P.2d 944 (Utah Ct. App. 1993) . .	17
<i>Prisbrey v. Bloomington Water Co.</i> , 2003 UT 56	16, 19
<i>Riordan v. Westwood</i> , 203 P.2d 922 (Utah 1949)	6
<i>S & G, Inc. v. Morgan</i> , 797 P.2d 1085, 1087 (Utah 1990)	8, 9, 15, 16, 18, 19
<i>Searle v. Milburn Irr. Co.</i> , 2006 UT 16	9-11
<i>United States v. District Court of the Fourth Judicial District in and for Utah County</i> , 238 P.2d 1132 (Utah 1951)	7, 10
<i>Western Water, LLC v. Olds</i> , 2008 UT 18	15, 17

Statutes:

Utah Code Ann. § 63G-4-102	2, 5, 14, 22
Utah Code Ann. § 63G-4-103	2, 4, 5, 12, 14, 22
Utah Code Ann. § 63G-4-203	2, 4, 12
Utah Code Ann. § 63G-4-207	12
Utah Code Ann. § 63G-4-401	8, 16
Utah Code Ann. § 63G-4-402	8, 13, 14
Utah Code Ann. § 63G-4-503	12
Utah Code Ann. § 73-1-3	6
Utah Code Ann. § 73-3-14	8, 11, 12
Utah Code Ann. § 73-3-2	7
Utah Code Ann. § 73-3-3	7
Utah Code Ann. § 73-3-6	3, 13
Utah Code Ann. § 73-3-7	3, 5-7, 11, 13-15, 19, 21, 22
Utah Code Ann. § 73-3-8	7, 8, 20, 21
Utah Code Ann. § 78A-3-102	1
Utah Code Ann. §§ 73-2-1 through 73-2-11	19

Rules:

Utah Admin. Code R. 655-6-2	8
Utah Admin. Code R. 655-6-8	12
Utah R. Civ. P. 24	6, 16, 17, 19, 22

Other Authorities:

Black’s Law Dictionary 1544 (6 th ed. 1990)	6
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Appellees,

ROY CITY,

Intervenor and Appellant.

REPLACEMENT BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah
Code Ann. §§ 78A-3-102(3)(f) and (4) (West 2004 & Supp. 2008).

ISSUE PRESENTED

Can Roy City intervene on *de novo* review of the State Engineer's administrative decision where Roy City failed to meet the statutory deadline for submitting a protest and was, therefore, not a party to the State Engineer administrative adjudication?

The trial court's decision on a question of law is reviewed for correctness.

Krouse v. Bower, 2001 UT 28, ¶2, 20 P.3d 895.

DETERMINATIVE STATUTES

Utah Code Ann. § 63G-4-102(1). Scope and applicability of chapter.

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern:

- (a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and
- (b) judicial review of the action.

Utah Code Ann. § 63G-4-103. Definitions.

(1) As used in this chapter:

* * * *

(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

Utah Code Ann. § 63G-4-203. Procedures for informal adjudicative proceedings.

(1) If an agency enacts rules designating one or more categories of adjudicative proceedings as informal adjudicative proceedings, the agency shall, by rule, prescribe procedures for informal adjudicative proceedings that include the following:

....

(g) Intervention is prohibited, except that the agency may enact rules permitting intervention where a federal statute or rule requires that a state permit intervention.

Utah Code Ann. § 73-3-7. Protests.

- (1) Any person interested may file a protest with the state engineer:
 - (a) within 20 days after the notice is published, if the adjudicative proceeding is informal; and
 - (b) within 30 days after the notice is published, if the adjudicative proceeding is formal.
- (2) The state engineer shall consider the protest and shall approve or reject the application.

STATEMENT OF THE CASE

Roy City appeals an order denying the City's Motion to Intervene as a defendant in the *de novo* review of a State Engineer Order dated May 10, 2007, issued after an informal adjudication. R. 240-242. That Order conditionally approved Plaintiff Taylor-West Weber Water Improvement District's ("Taylor-West") application to appropriate water, which it submitted to the State Engineer in January 2005. R. 45-48. The State Engineer notified the public that Taylor-West filed the application.¹ Interested parties then had 20 days to file a protest.² Those who filed a timely protest became parties – the Utah Administrative Procedures Act (UAPA) defines "party" to include "all persons

¹ See Utah Code Ann. § 73-3-6 (West 2004).

² Utah Code Ann. § 73-3-7 (West 2004).

authorized by statute or agency rule to participate as parties in an adjudicative proceeding.”³

Roy City failed to protest Taylor-West’s application within 20 days of the published notice. Rather, the City sent the State Engineer a letter some six months after the protest deadline and after the State Engineer held a hearing on the application. R. 178-179. Since the City did not file a protest within the statutory time limit, it was not a party in the State Engineer’s informal administrative proceeding. Because UAPA explicitly prohibits intervention in informal proceedings,⁴ Roy City could not become a party to that proceeding.

Displeased with the State Engineer’s conditional approval of its application, Taylor-West sought *de novo* review of the State Engineer decision in the Second District Court (R.1-48), and appropriately named the other parties to the State Engineer’s administrative proceeding as defendants in the *de novo* review. R. 2-3. Subsequently, Roy City sought to intervene in the trial court’s *de novo* judicial proceeding. R. 146-148. After hearing oral argument, Judge Heffernan denied Roy City’s intervention motion. R. 235-239. Roy City, by this appeal, seeks reversal.

³ Utah Code Ann. § 63G-4-103(1)(f) (West 2004 & Supp. 2008). The UAPA was renumbered in 2008. The substance was unaltered.

⁴ See Utah Code Ann. § 63G-4-203(1)(g) (West 2004 & Supp. 2008).

SUMMARY OF ARGUMENT

The only issue preserved for appeal is whether the trial court properly denied Roy City's motion to intervene in the *de novo* review of an agency decision where the City failed to file a protest within 20 days of publication of the application and, thus, was not a "party" in the State Engineer's administrative proceeding. UAPA allows persons "authorized by statute"⁵ to participate as parties, but the City failed to file a protest within the 20 days allowed.⁶

Roy City's letter, received six months after the statutory protest deadline,⁷ was not a valid protest under the State Engineer's statute that governs protestants to administrative proceedings.⁸ Thus, Roy City could not have been a "party" as defined by UAPA Section 63G-4-103(1)(f), which includes "all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding." The UAPA definition of "party" applies to both "state agency action . . . and . . . judicial review of the action."⁹ Roy City therefore is not, and cannot become, a party to the *de novo* review of the State Engineer's Order.

⁵ Utah Code Ann. § 64G-4-103(1)(f) (West 2004 Supp. 2008).

⁶ Utah Code Ann. § 73-3-7 (West 2004).

⁷ R. 178-179.

⁸ See Utah Code Ann. § 73-3-7(1) (West 2004).

⁹ Utah Code Ann. § 63G-4-102(1) (West 2004 & Supp. 2008).

Further, sound public policy supports excluding intervenors from *de novo* review proceedings. Allowing Roy City to intervene at the *de novo* review stage would permit an intervenor to bypass agency proceedings, undermine Section 73-3-7 and the State Engineer's authority to require timely protests, deprive trial courts of the State Engineer's expertise on certain issues, and chill the State Engineer's ability to gather and consider information from disparate sources.

The City argues that Rule 24 of the Utah Rules of Civil Procedure governs intervention and trumps the statutory requirement to protest within 20 days of published notice.¹⁰ But, a Court rule cannot contravene statutes governing administrative proceedings and court review of those proceedings.

BACKGROUND--*DE NOVO* REVIEW OF STATE ENGINEER DECISIONS

The State Engineer's Office receives thousands of applications annually to appropriate water, change uses under existing rights, and for other proposed actions. Water rights are treated as real property "incorporeal hereditaments"¹¹ and are, by nature, "usufructory."¹² Because the rights are incorporeal, Utah water law ties the right to a "beneficial use" that gives definition and substance to the right.¹³ The beneficial use

¹⁰ See Utah Code Ann. § 73-3-7 (West 2004).

¹¹ *In re Bear River Drainage Area*, 271 P.2d 846, 848 (Utah 1954).

¹² *Riordan v. Westwood*, 203 P.2d 922, 929 (Utah 1949). A usufruct is the right to "us[e] and enjoy[] and receiv[e] the profits of property that belongs to another[.]" Black's Law Dictionary 1544 (6th ed. 1990).

¹³ Utah Code Ann. § 73-1-3 (West 2004).

essentially is the right and, because most water rights are inextricably intertwined with other water rights, the State Engineer is charged with investigating applications to appropriate before approving them.¹⁴ Of special importance in the investigation is whether approval will impair other water rights.¹⁵

Applications to appropriate, such as the one at issue here, are requests to divert an amount of water from a specified source for a described beneficial use.¹⁶ The application sets in motion the State Engineer's administrative process, culminating in an order either approving or rejecting the application. As part of this process the State Engineer "shall consider" timely protests.¹⁷ Since no protestants may appear, and given that some proposals are quite complex, the State Engineer may investigate an application on his own rather than rely solely on information protestants submit.¹⁸ In his investigation, the State Engineer may gather information from disparate sources¹⁹ with

¹⁴ See Utah Code Ann. § 73-3-3 (West 2004) (amended 2008) and § 73-3-8 (West 2004 & Supp. 2007); *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989); see also *United States v. District Court of the Fourth Judicial District in and for Utah County*, 238 P.2d 1132, 1134 (Utah 1951)[hereinafter *U.S. v. Fourth District Court*](“the [State] Engineer must investigate and hear evidence of all interested parties and he should approve or reject [appropriation and change] applications”).

¹⁵ See Utah Code Ann. § 73-3-8(1)(ii) (West 2004 & Supp. 2007).

¹⁶ Utah Code Ann. § 73-3-2 (West 2004).

¹⁷ Utah Code Ann. § 73-3-7(2) (West 2004).

¹⁸ See Utah Code Ann. § 73-3-8 (West 2004 & Supp. 2007).

¹⁹ See *id.*

the goal of determining whether an applicant meets approval criteria.²⁰ This investigation, combined with consideration of protests, informs the State Engineer's decision whether to approve or reject an application.

State Engineer administrative proceedings are, by rule, informal unless otherwise designated.²¹ Due process rights are preserved by allowing a person harmed by a State Engineer decision who has exhausted his administrative remedies to seek judicial review of the decision.²² UAPA provides that a party aggrieved may obtain judicial review of a final agency action²³ and that "district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings" such as those the State Engineer conducts.²⁴ This *de novo* review essentially replicates the State Engineer's process. To initiate such an action a person must have been a party in the State Engineer's administrative process.²⁵ As the court proceeds with judicial review, it does not act as an appellate body, instead it "hold[s] a new trial rather than reviewing

²⁰ For an application to appropriate, those criteria appear in Utah Code Ann. § 73-3-8 (West 2004 & Supp. 2007).

²¹ Utah Admin. Code R. 655-6-2 (2006).

²² Utah Code Ann. § 73-3-14 (West 2004) (amended 2008); *see also* Utah Code Ann. § 63G-4-401 (West 2004 & Supp. 2008).

²³ Utah Code Ann. § 63G-4-401(1) (West 2004 & Supp. 2008).

²⁴ Utah Code Ann. § 63G-4-402(1)(a) (West 2004 & Supp. 2008).

²⁵ Utah Code Ann. § 63G-4-401; *Kunz & Co. v. State*, 913 P.2d 765, 770 (Utah 1996); *See also, S & G, Inc. v. Morgan*, 797 P.2d 1085, 1087 (Utah 1990).

the informal record.”²⁶ While the Court owes no formal deference to the State Engineer’s decision,²⁷ “failure to make known the nature of one’s rights in the course of an administrative proceeding clearly disentitles a party from raising its claim for the first time before a district court on *de novo* review.”²⁸ Before approving an application, the State Engineer must “determine . . . no vested water right will be impaired On plenary review, the trial court has the same obligation.”²⁹ In the judicial setting, “the applicant must proceed under and be governed by the same statutory provisions as would have been applicable had his application been approved by the state engineer.”³⁰

The Utah Supreme Court has defined and reinforced the district court’s role in the *de novo* review of State Engineer decisions, most recently in *Searle v. Milburn Irr. Co.*³¹ where the Court said: “[T]he state engineer’s decision to approve or reject an application ‘is administrative in nature and purpose[,] and the decision of the court on review, except for the formalities of the trial and judgment, is of the *same nature and for the same*

²⁶ *Archer v. Bd. of State Lands and Forestry*, 907 P.2d 1142, 1144 (Utah 1995).

²⁷ *Id.*

²⁸ *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 751 (Utah 1996) (quoting *S & G. Inc. v. Morgan*, 797 P.2d 1085, 1085 (Utah 1990)).

²⁹ *Crafts v. Hansen*, 667 P.2d 1068, 1070 (Utah 1983).

³⁰ *Eardley v. Terry*, 77 P.2d 362, 366 (Utah 1938).

³¹ 2006 UT 16, 133 P.3d 382.

purpose.”³² *U.S. v. Fourth District Court*,³³ says it this way: “[the district court] should simply determine whether the application was rightly rejected. To answer that question, the court stands in the same position as the state engineer did. It must determine from the evidence whether [the application meets the criteria].”³⁴ *Searle* summarizes:

Accordingly, the conclusion is inescapable that a district court, when reviewing the state engineer’s decision to approve or reject an application, is not sitting in its capacity as an adjudicator of rights, but is merely charged with ensuring that the state engineer correctly performed an administrative task. We stated as much in *Eardley*, when we acknowledged that, when conducting a *de novo* review of the state engineer’s approval or rejection of an application, the court simply “determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter.” 77 P.2d at 365.[³⁵]

Decades of case law demonstrate that *de novo* review in district court is to determine, a second time, whether the application should be approved or rejected.³⁶ The

³² *Id.* at ¶ 34 (emphasis supplied) (quoting *U.S. v. Fourth District Court*, 238 P.2d 1132 (Utah 1951), and citing to *Crafts v. Hansen*, 667 P.2d 1068, 1070 (Utah 1983) (stating that when a district court reviews the state engineer’s approval or denial of an application, “[t]he issues. . . [are] strictly limited to those which were, or could have been, raised before the State Engineer”)).

³³ 238 P.2d 1132 (Utah 1951).

³⁴ *Id.* at 1135.

³⁵ *Searle*, 2006 UT 16 at ¶ 35.

³⁶ *See id.*

applicant bears the burden of proof to persuade the court (initially, the State Engineer), that there is reason to believe the application meets the approval requirements.³⁷

Here, Roy City seeks party status, by intervention, which should be denied because it contradicts appropriate *de novo* review and contravenes UAPA's intent regarding who may take part in administrative and court review proceedings.

In this regard, in addition to the State Engineer, who acts as decision-maker in his own proceedings, and whose joinder is required in the *de novo* review of his administrative decisions,³⁸ persons may play one of three roles in such proceedings. They may be: (1) "parties," — i.e., the applicant and timely protestants; (2) "informants," who in one way or another become involved in the State Engineer's investigation or informal process but do not file a protest within the 20 days allowed under Section 73-3-7;³⁹ or (3) "non-participants" — those who neither protested, nor were involved in the informal process — in short, the rest of the world.

Because the statutes are clear concerning the role of parties in the *de novo* review of a State Engineer decision, the analysis below begins there. After explaining the statutory law governing parties, related legal principles are used to explain the policy

³⁷ *Id.* at ¶ 31.

³⁸ Utah Code Ann. § 73-3-14(2) (West 2004).

³⁹ These might include neighbors who respond to State Engineer investigational queries, expert reports, or those who object to the application outside of Section 73-3-7, each of which *could* be referred to in the State Engineer's order.

reasons for excluding non-participants and informants from the *de novo* review process. A statute governs the State Engineer's role in such proceedings: he "shall be joined as a defendant in all suits to review his decision."⁴⁰

ARGUMENT

1. ROY CITY DOES NOT SATISFY UAPA'S DEFINITION OF "PARTY" FOR BOTH STATE AGENCY ACTIONS AND JUDICIAL REVIEW OF THOSE ACTIONS.

The Utah Administrative Procedures Act (UAPA) defines "party" as:

the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.^[41]

Roy City fits none of these four definitions. First, it did not commence the proceeding. Second, it was not a respondent against whom the agency commenced an action. Third, it was not permitted by the State Engineer's Office (the presiding officer) to intervene.⁴² Fourth, Roy City could have but did not meet the statutory criteria to become "authorized by statute or agency rule to participate as [a] part[y] in the adjudicative proceeding."

⁴⁰ Utah Code Ann. § 73-3-14(2) (West 2004).

⁴¹ Utah Code Ann. § 63G-4-103(f) (West 2004 & Supp. 2008).

⁴² UAPA prohibits intervention in informal proceedings. Utah Code Ann. § 63G-4-203(1)(g) (West 2004 & Supp. 2008). State Engineer rules conform with UAPA in this regard. Utah Admin. Code R. 655-6-8 (2005). UAPA's definition of "party" includes potential intervenors in subsection 63G-4-103(f) because both formal adjudicative proceedings and declaratory orders allow intervention. Utah Code Ann. § 63G-4-207 and § 63G-4-503(4).

Utah Code Ann. § 73-3-7 (West 2004), which governs protests to applications submitted to the State Engineer says:

Any person interested may file a protest with the state engineer. . . within 20 days after the [Utah Code Ann. § 73-3-6] notice is published, if the adjudicative proceeding is informal; The state engineer shall consider the protest and shall approve or reject the application.

A protestant who files his protest within 20 days of public notice of an application filed with the State Engineer's office, becomes a "party" by UAPA definition. But Roy City did not submit information to the State Engineer until six months after the 20-day statutory limit elapsed. Therefore, as Roy City concedes, it meets no criterion to be considered a party under UAPA.⁴³

Roy City argues that its lack of party status in the State Engineer administrative proceeding is immaterial because, in the *de novo* review setting the Rules of Civil Procedure govern party status.⁴⁴ And UAPA does generally direct that during *de novo* review, proceedings are "governed by the Utah Rules of Civil Procedure."⁴⁵ This argument, however, overlooks that UAPA also, and more specifically, defines "party" for the judicial review of agency actions:

Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter,

⁴³ Appellant's Br. at 10, 12.

⁴⁴ Appellant's Br. at 9-13.

⁴⁵ Utah Code Ann. § 63G-4-402(2)(b) (West 2004 & Supp. 2008).

the provisions of this chapter apply to every agency of the state and *govern. . . judicial review of the action.*⁴⁶

In the judicial review of agency action, this more specific statute governs over the general direction to use the Utah Rules of Civil Procedure in Section 63G-4-402(2)(b). Thus, parties are limited by Section 63G-4-103(f) to (1) those who commenced the adjudicative proceeding (Taylor-West - by filing its application to appropriate water); (2) all respondents to an agency action (not applicable here);⁴⁷ (3) all persons permitted by the agency's "presiding officer" to intervene in the administrative proceeding (no intervention was or could have been allowed here); and (4) persons authorized by statute or agency rule to participate as parties in the adjudicative proceeding (in other words timely protestants under Section 73-3-7, *i.e.* Weber Basin Water Conservancy District and United States of America Bureau of Reclamation in this case). Since Roy City agrees it meets no criterion to be considered a party under UAPA,⁴⁸ it does not meet the definition of "party" for purposes of judicial review under Section 63G-4-102(1). It cannot, therefore, be a party in the judicial review of the action.

⁴⁶ Utah Code Ann. 63G-4-102(1) (emphasis supplied).

⁴⁷ UAPA defines "Respondent" as "a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person." Utah Code Ann. § 63G-4-103(1)(i).

⁴⁸ Appellant's Br. at 10, 12.

Those who miss the 20-day deadline to file a protest in the State Engineer's administrative proceeding⁴⁹ may not intervene before the State Engineer and should not be allowed to intervene in the *de novo* review proceedings.

Besides the statutory directives regarding party status, and thus intervention, sound policy undergirds UAPA and yields additional reasons for excluding Roy City from the judicial review of Taylor-West's application. The remainder of the brief explains the legal and policy reasons for UAPA properly excluding both "non-participants" and "informants" from intervening on *de novo* review.

2. INTERVENTION BY NON-PARTICIPANTS IN THE COURT'S *DE NOVO* REVIEW OF STATE ENGINEER ORDERS WOULD EVISCERATE THE STATE ENGINEER PROCESS AND DISRUPT THE EXPECTATIONS OF WATER USERS' AND OTHERS IMPACTED BY THEIR USE.

In this matter, Roy City requests this Court to significantly alter the historic water right application decision and review process. It asserts that anyone, even non-participants, may intervene in *de novo* review of a State Engineer decision. But, this would thwart the exhaustion doctrine, which requires parties to pursue all available administrative remedies before seeking *de novo* review.⁵⁰

The Supreme Court has said:

The requirement of participation [in the State Engineer's administrative proceedings] as a prerequisite to standing to appeal is a corollary of the

⁴⁹ See Utah Code Ann. § 73-3-7(1)(a) (West 2004).

⁵⁰ *Western Water, LLC v. Olds*, 2008 UT 18, ¶ 18, 184 P.3d 578, 584; see *S & G, Inc.*, 797 P.2d at 1087.

doctrine of exhaustion of administrative remedies. It is well settled under this doctrine that persons aggrieved by decisions of administrative agencies “may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine...matters properly determinable originally by such agencies.”^[51]

The Court concluded its opinion by saying: “we hold that [plaintiff] S & G lacks standing to [seek *de novo* review] because it waived its right to participate [in the *de novo* review] by its intentional inaction at the administrative level.”⁵² This is consistent with the whole tenor of UAPA – to be considered a party, you must be a party from the outset.⁵³

Yet Roy City argues that the trial court should have overlooked a putative intervenor’s failure to timely protest the administrative action below because, in a *de novo* review action, Rule 24 alone may grant entry to an action without regard to participation in the State Engineer’s administrative process. As Roy City states it, “[t]he Utah statutory and regulatory framework does not impose any restrictions on a late

⁵¹ *S & G, Inc. v. Morgan*, 797 P.2d 1085, 1087 (Utah 1990). Similarly, referring to a situation where a protestant filed almost four months after the protest deadline, the court said: “Clearly, Mr. Prisbrey lacked standing, as a matter of law, to challenge the change application proceedings, having failed to exhaust his administrative remedies by filing a timely protest to the state engineer.” *Prisbrey v. Bloomington Water Co.*, 2003 UT 56, ¶ 26, 82 P.3d 1119, 1125.

⁵² *S & G, Inc.*, 797 P.2d at 1088.

⁵³ Utah Code Ann. § 63G-4-401; *Kunz & Co. v. State*, 913 P.2d 765, 770 (Utah 1996) (litigant may not skip administrative adjudicative proceedings).

protestant from intervening in an ongoing proceeding for judicial review . . . other than as set forth in Rule 24 of the Utah Rules of Civil Procedure.”⁵⁴

The Utah Supreme Court has recently explained, in *Western Water, LLC v. Olds*,⁵⁵ the importance of exhaustion of administrative remedies in the context of State Engineer decision-making:

The basic purpose underlying the doctrine of exhaustion of administrative remedies is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.^[56]

As *Western Water* demonstrates, requiring exhaustion allows the State Engineer, with his acknowledged expertise in water matters, to initially address issues related to the application and all protests taken together in deciding an issue related to the application before him. Allowing non-participants to become parties after the State Engineer renders his decision and to then raise any issue they find newly convenient denigrates the agency process, negates the role of exhaustion, and significantly increases burdens on trial courts to determine issues.

The administrative process, on which applicants and practitioners rely, as well as subsequent *de novo* review proceedings in court, provide for the orderly allocation,

⁵⁴ Appellant’s Br. at 11.

⁵⁵ 2008 UT 18.

⁵⁶ *Id.* at 18 (quoting *Maverik Country Stores v. Indus. Comm’n*, 860 P.2d 944, 947 (Utah Ct. App. 1993)).

distribution, and administration of the state's water. Without this orderly process, harm may result. Likewise, those who rely on the certainty of water right decisions — water users, lienholders, security interest holders, and others – would be significantly less certain about the outcome of what amounts to a wide-open decision-making process.

Similarly, parties not only have the responsibility to exhaust their administrative remedies by participating before the State Engineer, but to raise their issues to him as well. *Badger v. Brooklyn Canal Co.*⁵⁷ requires that when an applicant initiates a State Engineer action, protesters must make themselves and their issues known if those issues are to be considered in subsequent *de novo* review proceedings.⁵⁸ In *Badger*, the Court found that even requiring the State Engineer to discern, from his own records, which water rights a protestant owns “would eviscerate the requirement that it is the protesters’ responsibility to make known the nature of their protest before the State Engineer.”⁵⁹ *Badger* relied on *S & G, Inc. v. Morgan* in which plaintiff contended his participation in the administrative process did not matter.⁶⁰ The Supreme Court responded:

[Plaintiff’s] interpretation ignores policy considerations which apply to all administrative decision making. A requirement of participation at agency level ensures that those who have an interest will bring to the agency’s attention all relevant facts and considerations at the time the agency makes its decision. Moreover, the requirement of participation gives the agency

⁵⁷ 966 P.2d 844 (Utah 1998).

⁵⁸ *Id.* at 847.

⁵⁹ *Id.* at 849.

⁶⁰ *Id.*

and the other participants notice of the identity and concern of interested parties.^[61]

Without having the relevant facts and all parties before it, State Engineer decisions are, in a sense, tentative, leaving trial courts in *de novo* review actions to discern what the State Engineer may have thought about this matter or that. Such a process is untenable because the State Engineer, the legislatively-designated water expert for the State,⁶² has no opportunity to deliberate and rule on vital issues raised by new parties for the first time in the *de novo* review setting. Thus, in the same way parties lack standing to challenge change application proceedings if they fail to exhaust administrative remedies by not participating in administrative proceedings or participating in an untimely fashion,⁶³ they waive their right to intervene in the judicial review of such proceedings as well.

Allowing Roy City to decide where and when it, or anyone, wants to become a “party” undercuts the 20 day protest deadline⁶⁴ and significantly shifts current expectations of Utah water users who subject themselves to and participate in the State Engineer’s administrative process. If a person may intervene in *de novo* review proceedings without prior notice, as long as he meets the relatively low standards of Rule

⁶¹ *S & G, Inc.*, 797 P.2d at 1087.

⁶² *See generally* Utah Code Ann. §§ 73-2-1 through 73-2-11.

⁶³ *See id.*; *Prisbrey*, 2003 UT 56, ¶ 26.

⁶⁴ Utah Code Ann. § 73-3-7 (West 2004).

24, established administrative process is disrupted and those who rely upon and participate in the process, as well as other vested water rights holders, could be harmed.

3. ALLOWING UNLIMITED ACCESS TO THE *DE NOVO* REVIEW PROCESS BY PERMITTING “INFORMANTS” – SUCH AS ROY CITY – TO INTERVENE WILL EVISCERATE THE STATE ENGINEER’S ROLE AS WATER ADMINISTRATOR AND WILL UNDERMINE THE *DE NOVO* REVIEW.

Roy City “participated” untimely in the State Engineer action – it provided information to the State Engineer that the State Engineer mentioned in his Order. The State Engineer’s Order points out that “[a]fter the hearing was held, Roy City sent a *letter of concern* dated October 10, 2006. While Roy City’s *concerns* were considered in the development of this Order, the City is *not considered a protestant* with legal standing.”⁶⁵ Informants in an informal proceeding, however, should not be treated the same as parties who complied with statutory requirements to file timely protests.

When the State Engineer receives an application to appropriate or to change the attributes of a water right, he routinely investigates issues raised by the application, including on-the-ground issues in the area of the proposed or existing water right.⁶⁶ While conducting such an investigation, the State Engineer often encounters and gathers information from non-parties who inform his decision and who may or may not be referenced in the State Engineer’s order. While Roy City approached the State Engineer

⁶⁵ Appellant’s Br., Addendum B, at 1 (emphasis supplied).

⁶⁶ See Utah Code Ann. § 73-3-8(1)(b) (West 2004 & Supp. 2007).

in the proceeding below, for *de novo* review purposes the City should be included with all those who provide information to the State Engineer but who, because they failed to timely protest an application,⁶⁷ cannot influence the judicial review of the State Engineer decision by becoming parties in the judicial action.

Because the State Engineer may investigate firsthand,⁶⁸ and is not constrained, as is a court, to consider only the information that parties bring to his attention, he *may* consider all information that he finds, or that is brought to him. Such discretionary analysis differs from the consideration he gives protests filed by parties, however, which he *must* consider.⁶⁹ In other words, the State Engineer, at his discretion, may consider or discard information he gathers in the course of the informal process – including a letter like Roy City’s.

The State Engineer has discretion to consider or disregard information brought to him by non-party informants. If all such informants could intervene on *de novo* review, the State Engineer would be constrained to evaluate all information, from anyone, in his administrative process, regardless of when such information is provided – depriving the State Engineer of significant agency discretion and authority. But, those informants who provide information in the State Engineer’s informal process are not

⁶⁷ See Utah Code Ann. § 73-3-7 (West 2004).

⁶⁸ Utah Code Ann. § 73-3-8(1)(b) (West 2004 & Supp. 2007).

⁶⁹ Utah Code Ann. § 73-3-7(2) (West 2004).

entitled to intervene at a later stage of the proceedings any more than a material witness is entitled to become a party at trial or on appeal of a trial court decision. An informant who merely shares information (or evidence) with the State Engineer, cannot thereby acquire the rights and privileges of a party who complies with applicable statutory mandates.⁷⁰

Once a party intervenes in a suit, the scope of its participation is limited only by the party's interests and Rule 24.⁷¹ This virtually unlimited right to take part in an action “encompasse[s] the right to litigate all [relevant] issues”⁷² and gives an intervenor all the sanction she needs to begin molding – indeed completely reshaping – a case to her wishes. Once ensconced, the intervenor may significantly impact the case, thus disrupting a sometimes precarious equilibrium between existing parties and introducing a very real “wild-card” into the *de novo* review. Even when it would benefit the State

⁷⁰ See Utah Code Ann. § 73-3-7 (West 2004). Even assuming, *arguendo*, that non-parties may intervene on *de novo* review, intervention should be limited to informants who file an untimely protest that was, or practically could have been, evaluated and responded to by the parties and the agency *before* the State Engineer issues his order. Such a limitation at least provides notice to the parties of potential issues and would prevent a person from completely bypassing the agency proceeding – preserving some of the State Engineer's discretion in handling information from informants and allowing the State Engineer at least some opportunity to comment on the issues. However, as explained, even this level of participation renders Utah Code Ann. § 73-3-7 (allowing 20 days to protest and become a party) and § 63G-4-102(1) (limiting parties to those defined under § 63G-4-103(f)) void and minimizes the efficacy of the State Engineer's proceedings.

⁷¹ *Chatterton v. Walker*, 938 P.2d 255, 259 & n.5 (Utah 1997).

⁷² *Id.* at 258.

Engineer, which is the case here, such participation should be disallowed because it makes the *de novo* review into a new and different proceeding.

CONCLUSION

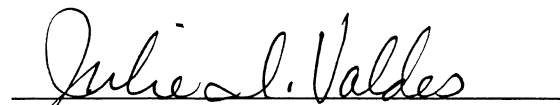
For the foregoing reasons, the State Engineer respectfully requests the Court to affirm the District Court's Order Denying Roy City's Motion to Intervene.

STATEMENT REGARDING ORAL ARGUMENT

Because the procedural posture of this case presents a unique situation that this Court should address, and because oral argument would help the Court understand this procedural posture, Defendant State Engineer respectfully requests oral argument in this matter.

RESPECTFULLY SUBMITTED this 15th day of April, 2009.

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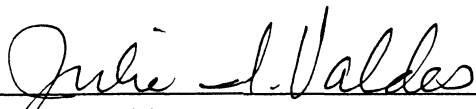
CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing REPLACEMENT BRIEF OF APPELLEE UTAH STATE ENGINEER were mailed by United States mail, first class postage prepaid, this 15th day of April, 2009 to each of the following:

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